No. 05-1159

FILED
MAY 12 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

MIKE HATCH, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF MINNESOTA
AND NOT AS AN INDIVIDUAL,
Petitioner,

v.

CELLCO PARTNERSHIP
D/B/A VERIZON WIRELESS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICI CURIAE* OF AARP, CONSUMERS UNION, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL ASSOCIATION OF STATE PIRGS, NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, and NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

[1] No counsel for any party authored any portion of this brief. No persons other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. Amici has filed with the clerk letters of consent from Petitioner and Respondents for the filing of this brief.

AARP is a nonprofit, nonpartisan organization with more than 36 million members representing the interests of Americans aged 50 and older. In response to the growing number of older wireless subscribers, who frequently use their cell phones primarily for security purposes, AARP advocates for rules and legislation to promote informed choice and consumer protection in the wireless telecommunications market.

Consumers Union is a nonprofit membership organization dedicated to providing consumers with information, education and counsel about goods, services, health and personal finance. Consumers Union's Consumer Reports regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare.

The National Association of Consumer Advocates ("NACA") is a non-profit group of attorneys and advocates committed to promoting consumer justice and curbing abusive business practices that bias the marketplace to the detriment of consumers. NACA's membership includes over 1,000 law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates across the country.

The National Association of State Public Interest Research Groups ("U.S. PIRG") serves as the national advocacy office for state PIRGs. The state PIRGs are non-profit, non-partisan public interest advocacy organizations with over 500,000 members. State PIRGs, and U.S. PIRG

advocate for, among other things, improved telecommunications services.

The National Association of State Utility Consumer Advocates ("NASUCA") is a voluntary, national association of 45 consumer advocates in 42 states and the District of Columbia. NASUCA's membership includes state agencies that represent the interests of utility consumers before state and federal regulators and in the courts, independent advocacy organizations, and divisions of State Attorneys General offices.

The National Consumer Law Center, Inc. ("NCLC") is a non-profit corporation engaged in research, education and litigation regarding matters that affect low-income consumers. NCLC's efforts focus on the prices and practices of regulated utilities, including telephone, electricity, and natural gas companies. NCLC intervenes in various proceedings before state and federal utility regulatory agencies.

SUMMARY OF ARGUMENT

The Court should grant *certiorari* because the Eighth Circuit has decided an important federal question involving the degree to which 47 U.S.C. § 332(c)(3)(A) of the Federal Communications Act of 1934, as amended ("FCA"), preempts state regulation of commercial mobile radio service ("CMRS" or "wireless"). Whether state laws, like Minnesota's "Consumer Protections for Wireless Customers" statute, Minn. Stat. § 325F.695 (2004) ("Minnesota Act"), regulate "rates charged by" wireless service and are therefore preempted under section 332(c)(3)(A) of the FCA, or whether such laws regulate "other terms and conditions of" wireless service over which state jurisdiction is preserved, not only

affects the 185 million Americans who currently subscribe to some form of wireless service, but every state whose laws conceivably could be affected by the Eighth Circuit's decision.

The Minnesota Act does not regulate wireless carriers' rates and therefore is not preempted under section 332(c)(3)(A) of the FCA. The Minnesota Act is a consumer protection law. It requires all wireless carriers to: (1) give consumers adequate notice prior to a proposed substantive change in their contracts, and (2) obtain consumers' affirmative consent to the change before modifying those contracts. The Minnesota Act is a legitimate, reasonable, and necessary exercise of Minnesota's police power that regulates the terms or conditions of wireless service.

The wireless industry has experienced astounding growth since 1993. Approximately 185 million Americans – more than sixty percent of the nation's population – were subscribed to wireless telephone service by December 2004. The wireless industry's robust growth, however, has been accompanied by widespread unfair, misleading and deceptive business practices that adversely affect consumers. Such practices harm consumers financially and deprive them of the information and choices they should have in a competitive marketplace. As a result, States have been forced to take a more active role in protecting consumers from the wireless industry's unfair practices, especially since the Federal Communications Commission ("FCC") does little more than compile the number of complaints it receives.

State laws or regulations enacted in response to unreasonable wireless practices, such as the Minnesota Act, are precisely the sorts of state consumer protection laws that Congress intended to preserve when it amended section

332(c)(3) of the FCA. By giving an unlawfully broad construction to what constitutes regulation of "rates charged by" CMRS, while giving an impermissibly narrow construction of "other terms and conditions" of CMRS reserved to State regulation, the Eighth Circuit ignored the purpose of the FCA and disregarded the principles of federalism.

Moreover, the notion that Congress intended to narrowly limit States' authority to regulate "other terms and conditions" of CMRS to "generally applicable" contractual or consumer fraud laws finds no support in the 1993 amendments to section 332. Congress' chief intent was to remove States from decisions relating to the licensing of CMRS providers and thereby promote the rapid deployment of wireless facilities and infrastructure. To the extent Congress may have expressed a general preference that competition should determine wireless rates, that preference is hardly synonymous with preempting States from prohibiting and deterring consumer abuses unrelated to the setting of rates. More significantly, to the extent Congress sought to foster the growth and development of the nation's wireless telecommunications infrastructure through its 1993 amendments to section 332(c)(3)(A), that goal has been achieved. The wireless industry is mature and needs no additional dispensations.

Significantly, the wireless industry is not only seeking to strike State wireless consumer laws, but has argued to other courts and the FCC that the decision below is precedent for invalidating consumer claims under general state contractual and consumer protection laws. Thus, the wireless industry's argument, if successful, will effectively grant the wireless industry a license to operate above the law.

For the foregoing reasons, *amici* urge the Court to grant Petitioner Hatch's Petition for a *Writ of Certiorari* and reverse the decision below.

ARGUMENT

The Court should grant *certiorari* because the Eighth Circuit[2] has decided an important federal question that has not been, but should be, settled by the Court. This question involves the degree to which section 332(c)(3)(A) of the Federal Communications Act of 1934, as amended ("FCA"),[3] preempts state regulation of commercial mobile radio service ("CMRS" or "wireless").

Certiorari should also be granted because the Eighth Circuit's decision conflicts with relevant decisions of the Court. While the Eighth Circuit observed that its interpretation of the scope of the express preemption clause in section 332(c)(3)(A) "must rest primarily on a fair understanding of congressional purpose," and presumes that Congress does not intend preemption of historic police powers of the States "unless that was [its] clear and manifest

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[2] *Cellco P'ship v. Hatch*, 431 F.3d 1077 (8th Cir. 2005).

[3] 47 U.S.C. § 332(c)(3)(A) currently states, in part:

> No State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

purpose,"[4] its review of section 332(c)(3)(A) failed to comport with these principles.

The Minnesota Act does not regulate wireless carriers' rates and is a legitimate, reasonable, and necessary exercise of Minnesota's police power to protect Minnesota consumers by regulating the terms or conditions of wireless service. The Minnesota Act is a consumer protection law. It requires all wireless carriers to: (1) give consumers adequate notice prior to a proposed substantive change in their contracts, and (2) obtain consumers' affirmative consent to the change before modifying those contracts. The Minnesota Act does not set, fix or prescribe any particular rate or charge. Nor does it directly affect wireless carriers' rates. The Minnesota Act merely prevents carriers from unfairly modifying customers' contractual obligations without notice or consent. Moreover, to enforce the Minnesota Act, a court would not consider the carrier's rate or make any determination about its reasonableness.

I. THE EIGHTH CIRCUIT'S DECISION HARMS MILLIONS OF CONSUMERS NATIONWIDE

A. The Need for State Wireless Consumer Protection Laws Has Grown With the Wireless Industry.

Since 1993, the wireless industry has expanded one-hundred and forty fold, from thirteen million to nearly 185 million customers. *See* Wireless Competition Bureau, Federal

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[4] *Cellco*, 431 F.3d at 1080, *citing Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996).

Communications Commission, Ninth Annual CMRS Report, Appendix A, Table 1 (Sept. 2004) ("9th CMRS Rept."). In 2006, CTIA, the Cellular Telecommunications & Internet Association, reported that wireless subscribership grew over fourteen percent from 2004 to 2005, making that year the "Highest Growth Year Ever: Up More than 25.7 Million [subscribers] from December 2004." *See* CTIA, Semi-Annual Wireless Industry Survey, "Year-End 2005 Estimated Wireless Subscribers" (2006), *available at* http://files.ctia.org/img/survey/2005_endyear/slides/EndYear_4.jpg. The wireless industry, moreover, consistently experienced double digit subscriber growth in each year since 2000. *Id.* As Petitioner Hatch noted, by the FCC's count, more than sixty percent of the nation's population subscribed to wireless telephone service by December 2004. Pet. 2.

Not only are more Americans subscribing to wireless service today than ever before, they are also steadily increasing their wireless usage. Americans no longer use their wireless phones simply to talk; they are also text messaging and using data services such as web searching, sending photographs, and downloading songs, games, and information from the Internet in record numbers. *See* CTIA, "Subscriber Growth Breaks Record... Again," Press Release (April 6, 2006), *available at* http://www.ctia.org/news_media/press/body.cfm?record_id=1600. As a result, wireless usage has increased exponentially since 1993. Between 1998 and 2003, wireless service usage quintupled from 143 to 813 average monthly minutes per subscriber. Matthew J. Kleinman, *Crossed Signals In a Wireless World: The Seventh Circuit's Misapplication of the Complete Preemption Doctrine*, 2004 Duke L & Tech. Rev. 14 (2004). In 2005 alone, carriers reported a sharp 35.8% increase in usage to more than 1.4 trillion minutes used - an increase of 400 billion minutes - over 2004. CTIA, Semi-Annual

Wireless Industry Survey, "Reported Wireless Minutes of Use Exceed 1.4 Trillion in 2005" (2006), *available at* http://files.ctia.org/img/survey/2005_endyear/slides/EndYear_6.jpg.

Concurrent with the remarkable growth in wireless subscribers and usage over the past decade, revenues have also risen sharply year after year. In 1993, the wireless industry posted approximately $10.9 billion in revenues, a figure that has grown each year, with 2005 revenues exceeding $113.5 billion. CTIA, Semi-Annual Survey, "CTIA's Semi-Annual Wireless Industry Survey Results: June 1985 - December 2005" (2006), *available at* http://files.ctia.org/img/survey/2005_endyear/slides/EndYear_2.jpg and http://files.ctia.org/img/survey/2005_endyear/slides/EndYear_3.jpg.

B. The Wireless Industry's Growth Has Been Accompanied By Widespread Unfair, Misleading and Deceptive Business Practices.

The wireless industry's growth has been accompanied by widespread unfair, misleading and deceptive business practices. Such practices harm consumers financially and deprive them of the information and choices they should have in a competitive marketplace.

Recent data compiled by the Better Business Bureau ("BBB") indicate that the wireless industry was the single most-complained about industry in 2004, and again in 2005, surpassing even car dealers in customer dissatisfaction.[5] The

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[5] Better Business Bureau, "Better Business Bureaus Provide Close to 90 Million Instances of Service in 2005," Press

BBB found most complaints fit into three categories: billing, quality of customer service, and misrepresentations or miscommunications by sales or customer service personnel. Likewise, *Amicus* Consumers Union, found that consumers wanted to see changes in the way wireless providers do business.[6] Similarly, J.D. Power and Associates recently found that one-third of wireless users contact their carrier with quality-related concerns, while forty-two percent of inquiries regarded billing issues, one-half of which are due to incorrect charges.[7]

Amicus AARP's recent surveys have likewise found that consumers are dissatisfied with wireless service.[8]

Release (March 8, 2006), *available at* http://www.bbb.org/alerts/article.asp?ID=663. *See also* Better Business Bureau, "Better Business Bureau Analysis of Cell Phone Complaints Reveals Root Causes of Customer Dissatisfaction," Press Release (May 4, 2004), *available at* http://www.bbb.org/alerts/article.asp?ID=511.

[6] Telecomweb, "Consumers Union Intensifies Pressure on Wireless Service Providers" (Jan. 20, 2004), *available at* http://www.telecomweb.com/news/1073596741.htm.

[7] J.D. Power and Associates, 2006 Wireless Customer Care Performance Study - Volume 1, Press Release (Jan. 25, 2006), *available at* http://www.jdpa.com/studies_jdpower/pressrelease3.asp?ID=2006016.

[8] *See* Baker & McLarty-Jackson, "Understanding Consumer Use of Wireless Telephone Service, Findings from an AARP Survey," AARP Public Policy Institute (Dec. 2000) ("2000 Wireless Survey"), *available at* http://assets.aarp.org/rgcenter/consume/d17328_wireless.pdf; *see also* Baker &

Eighty-four percent of frequent wireless users reported trouble making or receiving a call and, in one survey, almost ninety percent of respondents found their wireless phone difficult to operate. AARP found that "as more people come to rely on their cell phones as their primary phone and with older persons' reliance on wireless communications as a safety device, providing consumer protection to this industry has become a significant consumer issue."[9] In a recent survey of New York residents, AARP found that consumers overwhelmingly support state government action addressing widespread problems in the wireless market.[10]

Wireless complaints also constitute a significant percentage of all telecommunications complaints received by the FCC. The FCC's Consumer and Government Affairs Bureau's ("CGB") reports indicate an increase in complaints in recent years. The total number of wireless telecommunications complaints received by the CGB have nearly doubled over the past four years from 14,147 in 2002, to 25,942 in 2005 – exceeding even the rate of wireless subscriber growth over this time. Wireless telecommunications complaints, as a percentage of total telecommunications complaints, ranged from a low of 25.8%

Kim-Sun, "Understanding Consumer Concerns About the Quality of Wireless Telephone Service," AARP Public Policy Institute (June 2003) ("2003 Wireless Survey"), *available at* http://assets.aarp.org/rgcenter/consume/dd89_wireless.pdf.

[9] Dinger, "The Need for Wireless Telephone Consumer Protections: A Survey of New York Residents," AARP Knowledge Management, at 6 (June 2004), *available at* http://assets.aarp.org/rgcenter/consume/ny_wireless.pdf.

[10] Id. at 3-4.

in 2005, to a high of 32.6% in 2004, during this time period.[11]

State Commissions also receive a substantial number of wireless customer complaints. In 2004 the California Public Utility Commission ("CPUC") fined Cingular Wireless $12.4 million and ordered restitution that could amount to another $20 million for violating the State's consumer protection laws.[12] The CPUC noted that it had received over 1,000 complaints from Cingular customers, and that more than 144,000 customers had complained to the company.[13]

The CPUC's complaint figures illustrate that far fewer consumers complain to state or federal agencies than to the utility itself. According to AARP's nationwide survey of wireless customers, nearly half did not know who to contact if a carrier does not resolve a billing or service problem.

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[11] FCC, CGB Quarterly Inquiries and Complaints Reports, *available at* http://www.fcc.gov/cgb/quarter/welcome.html.

[12] Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Pacific Bell Wireless LLC dba Cingular Wireless, U-3060, U-4135, and U-4314, to Determine Whether Cingular Has Violated the Laws, Rules and Regulations of this State in Its Sale of Cellular Telephone Equipment and Service and its Collection of an Early Termination Fee and Other Penalties From Consumers, 2004 Cal. PUC LEXIS 453 (2004) (appeal pending *Pacific Bell Wireless, LLC dba Cingular Wireless v. Pub. Utilities Comm.*, Cal Ct. App., 4th App. Div. 3 (2005); *see also* CPUC Ann. Rep., July 1, 2003 - June 30, 2004, at 27).

[13] CPUC Ann. Rep., July 1, 2002 - June 30, 2003, at 23.

AARP 2003 Wireless Telephone Service at 4.

C. States Must Protect Wireless Consumers Because the FCC Does Not.

States have needed to take action to protect consumers from unfair or unreasonable business practices in the wireless industry because the FCC has not. The FCC does little more than prepare reports of complaints it receives. The FCC's quarterly consumer complaint reports, provide no carrier-specific information to enable States, or consumers, to identify how many complaints and inquiries are made against each CMRS provider. Similarly, the reports do not indicate what types of complaints and inquiries are made against each CMRS provider. Nor do the reports indicate the outcome of the consumers' complaints to the agency.

Despite having received nearly 83,000 wireless complaints since January 2002, the FCC has not issued a single fine or taken a single enforcement action against a CMRS in response to consumers' complaints. This is apparently consistent with the FCC's treatment of telecommunications consumers in general according Commissioner Michael J. Copps, who noted:

> From quarter to quarter, we receive more consumer complaints on telephone billing than on any other issue, with the one exception of indecency. What are we doing about it? Not much—and nothing recently.[14]

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[14] Remarks of Commissioner Michael J. Copps, "An Always-On Campaign for Consumers," Consumer Assembly 2004 – The Continuing Communications Revolution: The Need for

For wireless consumers, Commissioner Copps noted, the situation was even worse. Indeed, the only action the FCC appears willing to take in response to problems with wireless carriers' business practices, is action preempting States from addressing such problems.[15]

II. CONGRESS DID NOT IMMUNIZE WIRELESS CARRIERS FROM INDUSTRY-SPECIFIC STATE CONSUMER PROTECTION LAWS.

A. The Eighth Circuit's Decision Undermines Principles of Federalism.

The Eighth Circuit's finding that the Minnesota Act is preempted by section 332(c)(3)(A) effectively immunizes wireless carriers from industry-specific State contractual and consumer protection laws.

Clearly, section 332(c)(3)(A) contains only an "express" intent to preempt states from regulating wireless carriers' entry and the rates charged by CMRS. There is no implied preemption beyond the FCA's expressed language. Moreover, any suggestion that broader preemption is appropriate is squarely contradicted by the many savings

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Consumer Protection, at 4 (March 11, 2004); available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244855A2.pdf.

[15] *See, e.g., In re Truth-in-Billing and Billing Format,* Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 F.C.C.R. 6448, 6462-63 ¶30 (2005); *id.* at 6473-76 ¶¶49-54; *see also id.* at 6498-6501 (separate statements, approving in part, dissenting in part, of Commissioners Michael J. Copps and Jonathan S. Adelstein).

clauses contained in the FCA that recognize and preserve State authority over telecommunications-related matters.[16]

1. Congress Clearly Preserved State Laws Like Minnesota's Act.

State laws enacted in response to the wireless industry's unfair and deceptive business practices, such as the Minnesota Act, are precisely the sorts of consumer protection laws that Congress intended to preserve when it amended section 332(c)(3) of the FCA. Section 332(c)(3)(A), which contains the preemption language at the heart of the proceedings below, was added to the FCA in 1993. *See* Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 394 (1993). The Eighth Circuit failed to consider the 1993 amendments, and the legislative history of those amendments, in their entirety. Taken as a whole, the 1993 amendments and their legislative history show that Congress clearly did not intend to preempt laws such as the Minnesota Act.

The Eighth Circuit failed to give proper consideration to the statutory structure created by Congress in the 1993 amendments to section 332. These amendments made a

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[16] Generally, three situations exist in which federal law may preempt state law: (1) where a federal statute *expressly* contains language prohibiting or limiting state authority; (2) where a federal statute contains comprehensive language implying that federal law occupies the *field* of regulation; and (3) where state law is in direct *conflict* with a federal regulation. *La. Pub. Serv. Comm. v. FCC*, 476 U.S. 355, 368-69 (1986); *Cipollone v. Liggett Group*, 505 U.S. 504 (1992); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, (1982).

number of changes to the FCA regarding States' regulation of wireless carriers. First, the 1993 amendments introduced a distinction between commercial wireless and private mobile service. Next, Congress narrowed the prior scope of preemption that had prohibited States from "imposing any rate or entry regulation upon any private land mobile land service" by extending that preemption to CMRS but narrowing the preemption of rates to "rate charges" and allowing States to regulate wireless rates charged in certain circumstances. Finally, the 1993 amendments *added* a savings clause expressly preserving state regulatory authority over "other terms and conditions" of CMRS. 47 U.S.C. § 332(c)(3).[17]

The court below focused entirely on the first clause of section 332(c)(3)(A), ignoring the latter provisions of section 332(c)(3), which make clear that the scope of preemption of States' authority over CMRS rates is narrow. These latter provisions of section 332(c)(3) indicate that Congress did not intend to preclude States from having regulatory oversight over the wireless industry, even to the extent of resuming regulatory oversight of wireless rates. For example, the second clause of section 332(c)(3)(A) provides:

> Nothing in this subparagraph shall exempt

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[17] The Eighth Circuit noted that when section 332(c)(3) was added to the Act in 1982, it preempted some aspects of state wireless regulation. As originally enacted, section 332(c)(3) provided that "no State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service." 431 F.3d at 1080, *quoting* 47 U.S.C. § 332(c)(3) (1992).

> [CMRS] ... from requirements imposed by a State commission ... necessary to ensure the universal availability of telecommunications service at affordable rates.

47 U.S.C. § 332(c)(3)(A). This clause "allows a state to promote universal service by regulating rates if wireless services are a substitute for a substantial portion of the communications within the state." *CTIA v. FCC*, 168 F.3d 1332, 1335 (D.C. Cir. 1999).

Similarly, the Eighth Circuit ignored the third clause of section 332(c)(3)(A), and section 332(c)(3)(B). These provisions allow States, subject to FCC approval, to regulate CMRS "rates" if market conditions fail to protect consumers from unjust and unreasonable CMRS rates or unjustly or unreasonably discriminatory CMRS rates. *See* 47 U.S.C. §§332(c)(3)(A)(i) - (ii) & (B). Thus, not only did Congress expressly authorize States to enact laws, like the Minnesota Act, Congress also authorized States to enact laws regulating CMRS rates under certain circumstances.

The Eighth Circuit also ignored Congress' goal in amending section 332(c)(3).[18] Before 1993, States were prohibited from regulating the rates or entry of private land mobile services but fully regulated other wireless carriers to the extent they were "common carriers." The 1993 amendments were intended to ensure that States had greater authority over new, commercial wireless services than they would have had if those services had been classified as private mobile services. More importantly, the Budget Committee report made it clear that preserving States' authority to protect wireless consumers was a *primary*

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[18] 431 F.3d at 1080.

concern of Congress in amending the FCA.

Likewise, the Eighth Circuit failed to consider the other savings clauses in the FCA. For example, section 414 of the FCA provides:

> Nothing in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.[19]

The court's narrow reading of section 332(c)(3)(A)'s reservation of jurisdiction to States renders the general savings clause in section 414 of the Act superfluous.

Finally, Congress' chief intent when amending the FCA was to remove States from decisions relating to the licensing of CMRS providers and thereby promote the rapid deployment of wireless facilities and infrastructure. Significantly, to the extent Congress sought to foster the growth and development of the nation's wireless telecommunications infrastructure through its 1993 amendments to section 332(c)(3)(A), that goal has been achieved. The wireless industry is mature and needs no additional dispensations.

2. The Wireless Industry's Campaign for Immunity From State Contract and Consumer Protection Laws Also Must Be Rejected.

In addition to challenging State wireless specific consumer laws, wireless carriers are uniformly arguing that

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[19] 47 U.S.C. § 414.

any state law, regulation, or lawsuit brought under state contract or consumer protection law affects its rates and is therefore preempted.

For example, CTIA petitioned the FCC for a declaratory ruling that lawsuits challenging wireless carriers' imposition of "early termination fees" as illegal penalties under State consumer protection and contract laws are preempted under the FCA. Petition of the Cellular Telecommunications & Internet Association for an Expedited Declaratory Ruling, WT Docket No. 05-194, Public Notice, DA 05-1389 (May 18, 2005), 70 Fed. Reg. 38928 (July 6, 2005); *see also* Petition of SunCom Wireless Operating Company, LLC for a Declaratory Ruling, WT Docket No. 05-193, Public Notice, DA 05-1390 (May 18, 2005), 70 Fed. Reg. 38926 (July 6, 2005).

The wireless carriers also argued before the FCC that state regulation of misleading and deceptive line item billing charges is preempted. Truth-in-Billing and Billing Format, NASUCA Petition for Declaratory Ruling Regarding Truth-in-Billing, FCC 05-55 (Second Report and Order and Declaratory Ruling), (March 18, 2005). CMRS' efforts, therefore, if successful, will result in a license to operate above the law.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to grant the Petition for a Writ of Certiorari.

May 12, 2006

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